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U.S. SENATE REPUBLICAN POLICY COMMITTEE

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Litigation Positions are More Immediate than the Guantanamo Executive Order

Will President Obama Defend in Court the Country's Terrorist Detention Authority?

Executive Summary

- The Supreme Court has found that it is a clearly established principle of international law that unlawful enemy combatants may be detained for the duration of hostilities. Use of this authority has been critical to preventing an attack against the homeland since September 11, 2001.

- This law of war authority is constantly under attack in the federal courts. The previous Administration vigorously defended the authority because it was so vital to the defense of the nation, and it remains to be seen if the current Administration will similarly do so.

- Indeed, less prominently known than the Guantanamo closure Executive Order, but of much more immediate concern, are the potential changes this Administration may effect to positions currently held in detainee litigation cases.

- For example, will the current Administration choose to release terrorists designated for transfer from Guantanamo into the Washington, DC area?

- Additionally, will the current Administration conclude that the Constitution should not cover terrorist-detainees held in the active war zone at Bagram, Afghanistan; or will it continue to hold as an enemy combatant an al Qaeda terrorist captured and detained in the United States?

- As part of its oversight responsibility, Congress should be mindful of the potential changes the Obama Administration may bring to these positions in national security law cases involving terrorist detentions. Senators may wish to inquire about the positions on these matters of nominees for senior management positions at the Department of Justice, as well as for leadership positions of the relevant litigation components.

Introduction

The Supreme Court found that it is a clearly established principle of international law that unlawful enemy combatants may be detained for the duration of hostilities.[1] The use of this well-established authority has been critical to preventing an attack against the homeland since September 11, 2001.

This law of war detention authority is under constant attack in federal courts, and the previous Administration defended its authorities vigorously because they are so vital to the defense of the nation. As one of his first acts in office, President Obama may have unilaterally depleted that authority by issuing an Executive Order calling for the Guantanamo Bay detention facility to be closed within one year. Much less well-known publicly than the Guantanamo Executive Order, but of much more immediate concern, are the potential changes this Administration may effect to positions currently held in detainee litigation cases. In some cases, judges have already affirmatively asked the government if it plans to change the litigation position it currently holds in the case.

As part of its oversight responsibility, Congress should be mindful of the potential changes the Obama Administration may bring to crucial national security law cases involving law of war detentions. Senators may wish to inquire about the positions on these matters of nominees for senior management positions at the Department of Justice, as well as for leadership positions of the relevant litigation components. This paper outlines some of the most obvious and immediate questions raised in currently pending detainee litigation cases.

Questions Raised in Currently Pending Detainee Litigation

Will terrorists designated for transfer from Guantanamo be released in Washington, DC?

It would seem obvious that it should be the position of the United States government that terrorists held at Guantanamo should not be released into the United States. In July 2007, the Senate forcefully expressed that position, by a vote of 94-3, stating that Guantanamo detainees "should not be . . . transferred stateside into facilities in American communities and neighborhoods."[2] Members of the Senate voting in favor of that position included Vice President Biden and Secretary of State Clinton. If the Senate has so clearly expressed its position that terrorists held at Guantanamo should not be transferred into prison facilities in the United States, it would seem to follow that they should not be released into the United States.

It is, however, a very real possibility that terrorists held at Guantanamo can be ordered released into the United States. There are currently 17 Uighur terrorists held at Guantanamo who are designated for transfer or release from the facility. Although the Department of Defense has decided to treat these detainees as no longer enemy combatants, it is worth noting that these Uighur terrorists have by their own admission engaged in terrorist training for armed insurrection

[1] *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (citing, *inter alia*, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 Art. 118, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224).
[2] Roll Call Vote No. 259, 110th Cong., 1st Sess. (July 19, 2007).

at a camp sponsored by a terrorist group.[3] The federal government has diligently engaged in attempts to resettle these detainees to a third country, as it will not return them to their home country of China because it is more likely than not that they would be tortured there.

On October 7, 2008, Judge Urbina of the United States District Court for the District of Columbia ordered that these 17 Uighur terrorists be released into the Washington, DC area. The government promptly appealed this case, and oral argument was held in the lead case of *Kiyemba* before a three-judge panel of the D.C. Circuit Court of Appeals on November 24, 2008. A decision is still pending in the case.

Prior to Judge Urbina's order releasing the Uighur terrorists into the Washington, DC area, Democratic critics had mocked those concerned about this by stating that "there is no danger that any detainee will be released."[4] Quite to the contrary, that concern is obviously very real. After the inauguration of President Obama, the attorneys for the Uighur terrorists wrote to then-Attorney General-nominee Eric Holder to "urge the government to release the Uighurs immediately . . . [into] the United States."[5] There is nothing to prevent the current Administration from acceding to that request by withdrawing its appeal of Judge Urbina's ruling and rendering the case moot by releasing the Uighur terrorists into the United States in accordance with Judge Urbina's order. Moreover, it is unknown how the government would respond if it were to lose the appeal of the order.

Should the Constitution cover terrorist-detainees in the active war zone at Bagram?

Even though the Supreme Court has created a right for unlawful alien enemy combatants held at Guantanamo to challenge their detention in federal court, the current litigating position of the government is that federal courts in the United States lack subject matter jurisdiction to entertain a habeas case brought by an unlawful alien enemy combatant held at the Bagram Theatre Internment Facility in Afghanistan. In the lead case capturing this fact pattern, *Maqalah*, Judge Bates of the United States District Court for the District of Columbia recently invited the government to inform the Court of whether the government intends to "refine [its] position on this matter."[6] To extend this procedural constitutional right to an active war zone where coalition forces are engaged in daily combat "would lead to the anomalous result that any alien enemy engaged in warfare abroad and detained by the United States anywhere in the world can petition U.S. civilian courts for review of the military's decision to detain him."[7] The Obama Administration has been given until February 20, 2009 to inform the Court of whether it will maintain this position.

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[3] *Kiyemba v. Bush*, Case No. 08-5424, Brief for Appellants, p. 5 (D.C. Cir. Oct. 2008).
[4] Statement on Attorney General Mukasey's Remarks On 9/11 Detainees, July 21, 2008, *available at* http://democrats.senate.gov/newsroom/record.cfm?id=301011&.
[5] Sabin Willett, Letter to Eric H. Holder, Jr., then-Attorney General-nominee, dated Jan. 23, 2009, *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/01/swillett-1-23-09.doc.
[6] *Maqalah v. Gates*, Case No. 06-cv-01669-JDB, Order, Docket Entry #28 (D.D.C. Jan. 22, 2009).
[7] *Wazir v. Gates*, Case No. 06-cv-01697-JDB, Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support, p. 2, Docket Entry #12, (D.D.C. Oct. 3, 2008).

Will an al Qaeda terrorist captured in the United States continue to be detained as an enemy combatant in the United States?

On September 10, 2001, at the direction of al Qaeda leaders, Ali Saleh al Marri entered the United States to plan and execute war-like acts against the United States. He was to serve as a sleeper agent to facilitate terrorist activities after September 11.[8] On June 23, 2003, President Bush determined al Marri to be an enemy combatant, and he further directed the Secretary of Defense to take custody of al Marri from the Department of Justice, which had custody of him as he was awaiting trial. On July 15, 2008, the Fourth Circuit Court of Appeals, sitting en banc, held that the president had the authority to detain al Marri as an enemy combatant if the allegations against him were true, but determined that al Marri had received insufficient process to that point to challenge his designation as an enemy combatant.[9] The government was prepared to defend at the district court level the designation of al Marri as an enemy combatant, but al Marri appealed the ruling of the appellate court and it will now be heard by the Supreme Court. The government's merits brief in the Supreme Court case had been due February 20, 2009, but, in one of his first acts in office, President Obama ordered an internal review of the al Marri case, and the Supreme Court granted the government's request to delay the filing of its brief in the case until March 23, 2009.

It is an open question of how vigorously President Obama will defend the right to detain as an enemy combatant an al Qaeda terrorist who entered the United States for the purpose of committing war-like acts. The Administration may try to avoid addressing this matter either by transferring al Marri back to his home country of Qatar, or by bringing a criminal indictment against him and transferring him out of DOD custody and back into DOJ custody to face criminal charges. It is unclear how much this latter course of action is an option, as prior criminal charges against al Marri have been dismissed with prejudice, meaning that they cannot be brought against him again.[10] At a minimum, the government would be required to bring different charges against him.

Will the Executive continue to support the definition of "enemy combatant" blessed by Congress and the Judiciary?

Now that the Supreme Court has granted alien enemy combatants a constitutional right to challenge their detention in U.S. federal court, a court hearing these habeas cases must decide how to define the term "enemy combatant" in order to decide whether the government has sufficiently demonstrated that the detainee before the court is one. Since Congress has refused to provide any structure to these habeas cases, and these cases are before multiple district court

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[8] *Al Marri v. Pucciarelli*, Case No. 08-368, Brief for the Respondent in Opposition to Petition for Writ of Certiorari (Oct. 2008).

[9] *Al Marri v. Pucciarelli*, 534 F. 3d 213 (4th Cir. 2008).

[10] *Al Marri v. Hanft*, 378 F. Supp. 2d 673, 674-75 (D.S.C. 2005) (noting that the indictment against al Marri had been dismissed with prejudice). Given that this paper is more directed at a factual outline of current detainee litigation, it is beyond the scope of this paper to evaluate whether it would be a good idea to transfer terrorist al Marri to the civilian criminal justice system. It is quickly worth noting though that the 9/11 Commission found that an "unfortunate consequence" of the Ramzi Yousef trial "was that it created an impression that the law enforcement system was well-equipped to cope with terrorism." *9/11 Commission Final Report*, p. 72. Furthermore, the Commission described quite clearly how this public trial compromised U.S. intelligence information on al Qaeda. Id. at p. 472 n.8.

judges, there is nothing to prevent multiple and inconsistent definitions of the term from emerging. Judge Leon of the United States District Court for the District of Columbia became the first judge hearing these habeas cases to provide a definition, holding that

> An "enemy combatant" is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy combat forces.[11]

This finding was favorable to the government in that it adopted the definition the government used in the Combatant Status Review Tribunal (CSRT) process. Of note, Judge Leon stated that he was adopting this definition because it was, "in effect, blessed by Congress."[12]

It is unfortunately not assured that the other district court judges hearing detainee habeas cases will adopt this definition, and it is also unclear if the new Administration will support this definition. In one case, a judge has already specifically asked the new Administration if it "wish[es] to review the Government's current position regarding the appropriate definition of 'enemy combatant' to be used in these and other habeas cases involving Guantanamo Bay detainees," and "submit any refinement" of its position no later than February 9, 2009.[13] In another case, where the judge ordered the parties to submit their positions on the definition of an enemy combatant by January 28, 2009, the government requested a delay in the filing deadline until February 11, 2009.[14]

This issue is important for at least two reasons. First, a collection of the most dangerous individuals designated as enemy combatants are terrorist planners, financiers, and facilitators rather than operatives. For example, Mustafa al Hawsawi, an al Qaeda high value detainee currently detained as an enemy combatant and against whom military commission charges have been filed, was a crucial financier and facilitator for the 9/11 operatives. Terrorist financiers and facilitators are properly regarded as enemy combatants and the definition of enemy combatant should reflect such.

Second, President Obama has issued an Executive Order directing that the government review the cases of each enemy combatant held at Guantanamo to determine how the Obama Administration will handle these individuals, such as continued detention, prosecution, transfer, or release. It would seem that the definition of enemy combatant the Obama Administration submits to the courts will likely provide some guidance regarding who the Administration will regard in its internal review to be dangerous individuals and who it will define to be no longer an enemy combatant.

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[11] *Boumediene v. Bush*, Case No. 04-cv-01166-RJL, Docket Entry #237, Memorandum Order (D.D.C. Oct. 27, 2008).
[12] Id.
[13] *Hamlily v. Obama*, Case No. 05-cv-00763-JDB, Docket Entry #140, Order (D.D.C., Jan. 22, 2009).
[14] *Ahmed v. Obama*, Case No. 05-cv-01678-GK, Docket Entry #135, Respondents' Unopposed Motion for Extension of Time to File Briefs Regarding the Appropriate Definition of Enemy Combatant (D.D.C. Jan. 28, 2009).

Will this Administration oppose substantive constitutional rights for detainees to impose personal monetary liability on governmental officials?

In one of the numerous detainee litigation cases currently pending, four former Guantanamo detainees have filed a *Bivens* action claiming violation of their Fifth and Eighth Amendment rights while they were in custody at Guantanamo.[15] The crux of a *Bivens* action is a plaintiff seeking to impose personal liability for monetary damages on governmental officials for the officials' violation of the plaintiffs' constitutional rights. In one such case, *Rasul*, the detainees are seeking compensatory damages from our nation's military commanders in a time of war by claiming that the conditions of their confinement violated their constitutional rights. In January 2008, the D.C. Circuit rejected these claims, holding that these detainees had no such substantive constitutional rights, and even if they did, the officials against whom the detainees have brought suit would have the protection of qualified immunity.[16] The detainees appealed this ruling to the Supreme Court.

After filing the appeal, the Supreme Court in *Boumediene* provided Guantanamo detainees with a procedural constitutional right to challenge the lawfulness of their detention as enemy combatants. In that ruling, the Court specifically refused to "discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."[17] The Court further reiterated its position that it was only affording Guantanamo detainees procedural protections and the case was not deciding "the [substantive] content of the law that governs petitioners' detention."[18]

On December 15, 2008, the Supreme Court granted the *Rasul* detainees' appeal, vacated the judgment of the D.C. Circuit in the case, and remanded the case back to the D.C. Circuit for further consideration in light of the *Boumediene* decision. Six days later, the D.C. Circuit set a briefing schedule for the case, ordering that the government's brief be due January 6, 2009, which would make the detainees' brief due January 16, 2009.[19] Therefore, briefing in the case of whether Guantanamo detainees have substantive constitutional rights would have been completed prior to the end of the Bush Administration. Attorneys for the detainees, however, successfully sought a delayed briefing schedule, over the government's objection, and now the entirety of the briefing will take place under the Obama Administration.[20]

The *Rasul* case presents a fundamental question of whether Guantanamo detainees have substantive constitutional or statutory rights beyond the procedural right conferred upon them by *Boumediene*. In *Rasul*, the former detainees are seeking to subject governmental officials personally to monetary liability by claiming that detainees do have substantive rights with

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[15] In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court created a cause of action for money damages for an individual claiming that federal officials violated his Fourth Amendment rights, and that cause of action has since been extended to putative violations of the Fifth and Eighth Amendments. *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (recognizing that the *Bivens* action has been so extended).
[16] *Rasul v. Myers*, 512 F. 3d 644, 665-67 (D.C. Cir. 2008).
[17] *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).
[18] Id. at 2277.
[19] *Rasul v. Myers*, Case No. 06-5209, Order (D.C. Cir. Dec. 22, 2008).
[20] On January 2, 2009, the D.C. Circuit issued an order in the case setting a briefing schedule where the first set of briefs would be due January 26, 2009. On the first day after the inauguration, a consent motion was filed seeking a further extension of time, which the Court granted, and the first set of briefs in this case is now due March 12.

respect to the conditions of their confinement. The government's position to this point is that detainees do not have substantive constitutional rights, and thus there is nothing to remedy through the imposition of personal liability on governmental officials for putative violations of such rights. That position may now be re-visited by the new Administration.

Conclusion

Aggressive use of the well-established authority to detain unlawful enemy combatants in a time of war has been critical to preventing another attack on the homeland since September 11, 2001. There are numerous cases brought by terrorists in federal courts challenging critical aspects of the country's detention authority. Failure to defend the authority vigorously would weaken one of the country's most vital counter-terrorism tools.